Supreme Court, U.S.
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No. 91-1637

In The

Supreme Court of the United States

October Term, 1991

GURNEY ALFRED,

Petitioner,

v.

UNITED PARCEL SERVICE, INC., et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED FOR REVIEW

Whether the Fifth Circuit Court of Appeals correctly affirmed the district court's holding that the General Truck Drivers, Chauffeurs, Warehousemen and Helpers Local Union No. 270 did not, as a matter of law and based on the undisputed facts, violate its duty of fair representation.

LIST OF ALL PARTIES TO THE PROCEEDINGS BELOW

1. Gurney Alfred, petitioner
2. United Parcel Service, Inc.,[1] respondent
3. General Truck Drivers, Chauffeurs, Warehousemen and Helpers Local Union No. 270, respondent

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[1] Pursuant to Sup.Ct.R. 29.1, United Parcel Service, Inc. informs the Court that its parent corporation is United Parcel Service of America, Inc., and that all subsidiaries are wholly-owned subsidiaries of which Sup.Ct.R. 29.1 does not require disclosure.

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STATUTES AND REGULATIONS INVOLVED

29 U.S.C. § 151:

§ 151. Findings and declaration of policy

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and

bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 185:

§ 185. Suits by and against labor organizations

(a) Venue, amount and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States with jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall

be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process

The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts were actually authorized or subsequently ratified shall not be controlling.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in Courts Below

Plaintiff[2] filed his lawsuit on November 17, 1989, claiming that United Parcel Service ("UPS" or "Company") breached the collective bargaining agreement with

[2] For purposes of this Brief, Petitioner Alfred will be referred to as "Plaintiff" and Respondents UPS and Local 270 will be referred to as "Defendants."

the General Truck Drivers, Chauffeurs, Warehousemen & Helpers Local Union No. 270 ("Local 270" or "Union") when it terminated his employment, and that the Union breached its duty of fair representation in the contractual grievance proceedings protesting his discharge. This type of claim is commonly referred to as a hybrid § 301/DFR suit, because in order to sue the Company for breach of the collective bargaining agreement under § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, Plaintiff must show that the Union breached its duty of fair representation, implied under the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151, *et seq.*, during the contractual grievance proceedings, and that the Union's breach affected the result or outcome of the grievance proceedings.[3] *See DelCostello v. Int'l Brotherhood of Teamsters*, 462 U.S. 151, 164-65, 103 S. Ct. 2281, 2290-91, 76 L.Ed.2d 476 (1983) (explaining § 301/DFR suits).

On August 22, 1990, the Company and Union filed motions for summary judgment because the undisputed facts showed the Union had not breached its duty of fair representation and because Plaintiff had failed to show how the alleged deficiencies in the Union's representation affected the outcome of the grievance proceedings. Plaintiff filed an Opposition on November 26, 1990. The district court granted Defendants' motions for summary judgment on January 14, 1991, and entered a judgment on

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[3] Plaintiff originally also brought state law claims, but the district court held that those claims were preempted by § 301 of the LMRA (Appendix A to Plaintiff's Petition for Writ of Certiorari at App. 7). Plaintiff did not dispute this holding on appeal.

January 17. (Appendix A to Plaintiff's Petition for Writ of Certiorari ("Plaintiff's Petition")). Plaintiff filed a "Petition for Rehearing" on February 1, 1991. The district court denied the Petition for Rehearing on May 20, 1991, on the basis that no newly discovered evidence had been produced. (Appendix B to Plaintiff's Petition). The Fifth Circuit Court of Appeals affirmed the district court's judgment in a per curiam opinion. (Appendix C to Plaintiff's Petition).

B. Statement of Facts

Plaintiff is a former employee of UPS. Plaintiff was terminated on May 18, 1989 for making unauthorized long distance telephone calls on company time at company expense.

At all relevant times, Plaintiff was a member of Defendant Union and his terms and conditions of employment were governed by the collective bargaining agreement ("CBA") between UPS and the Union. The CBA prohibits UPS from terminating an employee without just cause. The agreement also provides a grievance procedure, the results of which are final and binding on the parties. On May 25, 1989, Plaintiff, through his Union, filed a grievance protesting his discharge and requesting back pay and reinstatement. Plaintiff's grievance was processed through the highest level of the grievance procedure authorized under the CBA – the "Deadlock Committee." The Deadlock Committee denied Plaintiff's grievance and sustained his discharge.

The subject of Plaintiff's grievance related to his discharge for making personal long distance telephone calls

at company expense and on company time. Plaintiff filed this suit on November 17, 1989, asserting that the Union failed to properly represent him during the grievance proceeding and that the Company breached the collective bargaining agreement by terminating him. Plaintiff now claims the only investigation performed by the Union officer who represented him, Nolan LeBlanc, was to obtain the telephone number that the Company claimed Plaintiff called. LeBlanc advised Plaintiff to call the number and ask for a statement that Plaintiff had not called there. In an uncontradicted affidavit, LeBlanc explained that he believed the call should come from Plaintiff because: 1) people are often reluctant to talk to Union officials concerning what they consider a labor dispute; 2) the parties to a grievance, including the Union, have no means of forcing testimony through a subpoena or other method; and 3) in his experience, people are often more cooperative and sympathetic when asked for a statement by the person whose job is at risk. Plaintiff called the telephone number and obtained the statement of Willie Mae Turner, the woman to whom the telephone number was registered, stating that Plaintiff had never called her. The Company, however, asserted that Plaintiff was calling the daughter of Willie Mae Turner. Plaintiff failed to depose Turner's daughter or to get the daughter's affidavit in opposition to Defendants' motions for summary judgment. (Appendix A to Plaintiff's Petition at App. 6-7).

SUMMARY OF THE ARGUMENT

Plaintiff failed to show any special or important reason why this Court should grant his Petition. He merely argues that the district court and Fifth Circuit holdings were wrong. This assertion is insufficient to merit the granting of a writ of certiorari. Further, Plaintiff did not support his reasons why the Petition should be granted with specific facts or legal citations.

In any event, the holdings of the district court and Fifth Circuit were correct. The Union did not breach its duty of fair representation in the contractual grievance proceedings. Further, Plaintiff failed to show that the alleged breach affected the result or outcome of the grievance proceedings.

A finding that the Union breached its duty of fair representation is an indispensable prerequisite to maintenance of the § 301 breach of contract suit against the employer. If the plaintiff cannot show that the Union breached its duty of fair representation, the suit must be dismissed without reference to any merits of the underlying breach of contract claim against the employer. Moreover, the plaintiff must be able to show that the alleged breach affected the outcome of the case.

In order to establish that the Union breached its duty of fair representation, the plaintiff must show its actions were either arbitrary, discriminatory, or in bad faith. This burden requires more than a showing of negligence or honest mistaken conduct. The Union's conduct is arbitrary only if the Union's behavior is so far outside a wide range of reasonableness as to be irrational.

Summary judgment is appropriate if the party opposing it fails to establish an essential element of the case which is his burden to prove at trial. Plaintiff established neither that the Union breached its duty of fair representation, nor how a different course of conduct would have changed the outcome of the grievance proceeding. Failing to establish either of these essential elements is fatal to Plaintiff's case. Accordingly, the district court correctly granted the Defendants a summary judgment.

ARGUMENT

A. Plaintiff's Petition Does Not Present Any of the Requisite Factors Which the Court Considers in Granting a Petition for Writ of Certiorari

The Supreme Court grants a Petition for Writ of Certiorari when the case presents "special or important reasons" for granting of the writ. Sup.Ct.R. 10.1. None of the considerations that weigh in favor of granting a writ petition are present in the instant case: 1) although Plaintiff asserts that district courts "have not expressed a consensus concerning the meaning of perfunctory" when dealing with a claim for a Union's breach of the duty of fair representation, Plaintiff does not cite to any cases where the district courts or courts of appeal are in conflict on this issue;[4] 2) the Fifth Circuit did not depart from the accepted and usual course of judicial proceedings, nor

[4] Under Sup.Ct.R. 10.1, the Court will consider exercising its discretionary review if the decisions of two *circuit* courts are in conflict, something which Plaintiff does not even contend.

did it sanction such a departure by the district court; and 3) nothing in this case presents an important, new decision of federal law meriting Supreme Court review.

This case presents a run-of-the-mill § 301/DFR claim. Plaintiff fails to point out anything exceptional about the holdings below. In fact, Plaintiff does not even *attempt* to demonstrate why any of the factors in Sup.Ct.R. 10.1 should apply to this case, but merely asserts that the district court and Fifth Circuit reached the wrong decision. Even if that assertion were true, it would not be sufficient to invoke this Court's review, absent one of the factors listed in Sup.Ct.R. 10.1 or other extraordinary circumstances that are not present here.

B. Plaintiff Failed To Comply With Sup.Ct.R. 24.1(i)

Supreme Court Rule 24.1 sets forth the requirements for a petition for writ of certiorari. Subsection (i) provides that the petition must contain:

> (i) The argument, exhibiting clearly the points of fact and law being presented and citing the authorities and statutes relied upon.

Plaintiff fails to meet these requirements.

Although Plaintiff properly notes this Court has held that in order to be actionable, the breach of duty must affect the result of the grievance (citing *Humphrey v. Moore*, 375 U.S. 335, 351, 84 S. Ct. 363, 372, 11 L.Ed.2d 370 (1964)), Plaintiff does not cite any specific facts to support his bare assertion that any further investigation by the

Union would have changed the outcome of the grievance.[5]

Second, Plaintiff states that "district courts" disagree on the meaning of the term "perfunctory" in a § 301/DFR context. However, Plaintiff fails to cite *any* case law to support this point. Therefore, the Petition should be denied.

C. The District Court Properly Granted Summary Judgment and the Fifth Circuit Properly Affirmed the District Court's Holding

The controlling issue below was whether the Union breached its duty of fair representation in the contractual grievance proceedings and, if so, whether such a breach affected the result or outcome of the grievance proceedings.

A finding that the Union breached its duty of fair representation is an indispensable prerequisite to maintenance of the § 301 breach of contract suit against the employer. *See, e.g., DelCostello,* 462 U.S. at 164-165, 103 S. Ct. at 2290-91; *United Parcel Serv. v. Mitchell,* 451 U.S. 56, 62, 101 S. Ct. 1559, 1563-64, 67 L.Ed.2d 732 (1981). If the plaintiff cannot show that the union breached its duty of fair representation, the suit must be dismissed without

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[5] The district court below expressly found that Plaintiff failed to make any showing that the grievance would have turned out any differently if the Union had done any further investigation, such as contact Turner's daughter. (Appendix A to Plaintiff's Petition at App. 6).

reference to any merits of the underlying breach of contract claim against the employer. *Id.*; *see also Bache v. AT&T Co.*, 840 F.2d 283, 290 (5th Cir.), *cert. denied sub nom Bankston v. AT&T*, 488 U.S. 888, 109 S. Ct. 219, 102 L.Ed.2d 210 (1988). Plaintiff failed to produce evidence to raise a question of fact as to whether the Union breached its duty of fair representation. Therefore, the district court properly granted summary judgment.

Moreover, Plaintiff must be able to show that the alleged breach affected the outcome of the case. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 567-68, 96 S. Ct. 1048, 1058-60, 47 L.Ed.2d 231 (1976); *Humphrey v. Moore*, 375 U.S. at 351, 84 S. Ct. at 372.

In order to establish that the Union breached its duty of fair representation, Plaintiff must show its actions were either "arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190, 87 S. Ct. 903, 916, 17 L.Ed.2d 842 (1967); *Air Line Pilots Ass'n v. O'Neill*, 111 S. Ct. 1127, 1130, 1135, 113 L.Ed.2d 51 (1991). This burden is a heavy one, inasmuch as a breach of the duty of fair representation requires more than a showing of negligence or honest mistaken conduct. *Amalgamated Ass'n of Street, etc. v. Lockridge*, 403 U.S. 274, 299-300, 91 S. Ct. 1909, 1924, 29 L.Ed.2d 473 (1971). The union's conduct is arbitrary only if the union's behavior is so far outside a wide range of reasonableness as to be irrational. *O'Neill*, 111 S. Ct. at 1130.

In the present case, the undisputed facts demonstrated that the Union's actions were not "arbitrary, discriminatory, or in bad faith." Plaintiff even admitted in his deposition that he was telling the truth when he told

the Grievance Committee that the Union had given him fair and proper representation. Plaintiff alleges in his Petition that the Union's breach of duty was LeBlanc's failure to call the telephone number himself. (Plaintiff's Petition at 4-5). LeBlanc's reasons for having Plaintiff call the telephone number instead of doing it himself are rational, not arbitrary or discriminatory.

With respect to showing that the alleged breach would have affected the outcome of the case, it is "idle speculation to assume the result would have been different" where a plaintiff fails to establish what he could have added to the case if he had been differently represented. *Humphrey v. Moore*, 375 U.S. at 351, 84 S. Ct. at 372; *Hines*, 424 U.S. at 568, 96 S. Ct. at 1058. As of the date the district court granted the defendants' motions for summary judgment, fourteen months to the day after Plaintiff filed his suit, Plaintiff had produced no evidence in support of his contention that he did not make unauthorized long distance telephone calls, other than the evidence that was introduced during the grievance proceedings. As the district court noted:

> [P]laintiff complains about the Union's failure to interview "the individual Mr. Alfred allegedly placed calls to." . . . The court assumes that plaintiff is referring to the deposition of Mrs. Willie Mae Turner, defendants' exhibit "G". *That testimony in no way exonerates plaintiff since it is clear that the individual the company believed plaintiff had been calling was Mrs. Turner's daughter.* If the daughter's deposition has been taken, plaintiff failed to submit it. Moreover, as defendants correctly point out, plaintiff himself secured a

written statement from Ms. Turner which was presented at the initial hearing.

(Plaintiff's Petition at App. 6-7).

Summary judgment is appropriate if the party opposing it fails to establish an essential element of the case which is his burden to prove at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). Plaintiff was able to establish neither that the Union breached its duty of fair representation, nor how a different course of conduct would have changed the outcome of the grievance proceeding. Failing to establish either of these essential elements is fatal to Plaintiff's case. Accordingly, the district court correctly granted the defendants a summary judgment.

CONCLUSION

Plaintiff has not shown any "special or important reasons" why a writ of certiorari should be granted in this case. Sup.Ct.R. 10.1. Plaintiff has not alleged (i) any conflict between the circuits, (ii) departure by the Fifth Circuit from the accepted and usual course of judicial proceedings, or (iii) a sanction of such a departure by the district court. Plaintiff has not complied with Sup.Ct.R. 24.1(i), which requires the petitioner to state the facts upon which his assertions are based, as well as the legal authority supporting his position. Denial of the writ of certiorari will work no injustice in the instant case, since the decisions of the district court and court of appeals are

clearly correct under existing law. For these reasons, the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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